

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ROBERT S. ABRAMS, OFFICER OF	:	DETERMINATION
FINGER LAKES FARM STORES, INC.	:	DTA NO. 807926
	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1985	:	
through November 30, 1986.	:	

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Petitioner, Robert S. Abrams, officer of Finger Lakes Farm Stores, Inc., P.O. Box 446, Fultonville, New York 12072, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through November 30, 1986.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 8, 1991 at 1:15 P.M. Petitioner filed a brief on January 15, 1992. The Division of Taxation filed a brief on February 5, 1992. Petitioner did not file a reply brief. Petitioner appeared by James C. Hayes, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly assessed petitioner as a person responsible to collect tax on behalf of Finger Lakes Farm Stores, Inc. pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

On April 12, 1988, the Division of Taxation issued to petitioner, Robert S. Abrams, two notices of determination and demands for payment of sales and use taxes due. Each notice asserted petitioner's liability "individually and as officer of Finger Lakes Farm Store, Inc.

trading as Hi-Health Dairy Store" and each assessed tax, penalty and interest for the period September 1, 1985 through November 30, 1986. One of the notices bore identification number 073281539S1 and assessed \$17,901.81 in tax due, plus penalty and interest. The other notice bore identification number 073281539S2 and assessed \$13,192.12, plus penalty and interest.

By Conciliation Order dated December 22, 1989, the assessment set forth in the notice bearing an identification number ending "S1" was reduced to \$15,805.08, plus penalty and interest. The Conciliation Order sustained the notice bearing an identification number ending "S2".

The assessments herein constitute sales taxes reported but not paid by the corporate entity, Finger Lakes Farm Stores, Inc.

Finger Lakes Farm Stores, Inc. operated two convenience-type stores under the name "Hi-Health Dairy Store". One store was located at 200 Franklin Street, Watkins Glen, New York, and the other store was located at 114 East Main Street, Odessa, New York.

Petitioner was concededly president of Finger Lakes Farm Stores, Inc. until January 1, 1984. Petitioner's involvement in the corporation's activities as president before January 1, 1984 is evidenced by the following:

- (a) Petitioner signed certificates of registration as a vendor for sales and use tax purposes for both the Watkins Glen and Odessa stores (see Findings of Fact "13" and "14").

- (b) Petitioner signed a lease dated September 16, 1981 by which the corporation leased premises for the Odessa, New York store.

- (c) Petitioner signed an application, dated October 27, 1981, together with certain other documents submitted to the State Liquor Authority for a license to sell beer at the Odessa, New York store.

- (d) Petitioner also signed certain documents dated June 10, 1983 submitted to the State Liquor Authority in connection with the corporation's renewal of its license to sell beer.

It should be noted that petitioner controlled another corporation, "Glen & Mohawk Milk Association, Inc."<sup>1</sup> It appears from the record that, although Finger Lakes Farm Stores, Inc. operated both Hi-Health Dairy Stores, the license to sell beer for the Watkins Glen store was held in the name of Glen & Mohawk Milk Association, Inc. The record contains no explanation for this situation.

Scant evidence was presented regarding the day-to-day operations of the corporation. In a document submitted to the State Liquor Authority as part of its licensing application, the corporation stated that it intended to hire a manager to manage the Odessa, New York store. This document, dated October 27, 1981, was signed by petitioner as president. Additionally, petitioner's sole witness, the attorney for petitioner and Finger Lakes Farm Stores, Inc., testified that petitioner never ran the stores on a day-to-day basis, and that such operations were delegated for a

period of time to petitioner's son, David Abrams, and later to an entity which operated convenience stores. The source of this witness's knowledge of the stores' operations is not set forth in the record.

The record does not contain sufficient information from which to conclude how the corporation's sales tax returns were prepared.

Petitioner and his wife, Marilyn Abrams, were the sole shareholders and directors of the corporation. They continued to hold such positions throughout the audit period.

At hearing, petitioner presented a letter dated December 31, 1983 whereby petitioner purportedly resigned as president and treasurer of the corporation effective January 1, 1984. Said letter was maintained in the corporation's minute books. Petitioner also presented a copy of the minutes of a special meeting of the board of the corporation dated January 3, 1984

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<sup>1</sup>Petitioner's signature as president of Glen & Mohawk Milk Association, Inc. appears on various license applications, license renewals and license surrender documents filed with the State Liquor Authority which were entered into the record.

whereby Kenneth Miner was elected president and treasurer of the corporation. Mr. Miner was described by petitioner's sole witness at the hearing as the corporation's bookkeeper.

Petitioner also signed as president of Finger Lakes Farm Stores, Inc. a State Liquor Authority license renewal application dated June 1, 1986 and a State Liquor Authority certification dated June 13, 1986. Additionally, petitioner signed a petition for surrender of the corporation's beer license dated December 1, 1986 and a State Liquor Authority certification for a refund dated December 29, 1986.

Petitioner did not personally appear at the hearing herein.

A certificate of registration for sales and use tax purposes was filed on behalf of the Hi-Health Dairy Store located in Watkins Glen, New York in 1978. Petitioner was listed thereon as the sole "owner(s) and/or principal officers". Petitioner's signature appears on the certificate under the title "president".

A certificate of registration dated October 22, 1981 was filed on behalf of the Odessa, New York Hi-Health Dairy Store. This certificate was signed by petitioner, as president, and listed petitioner as president and the sole "owner(s) and/or principal officers".

The Odessa and Watkins Glen Hi-Health Dairy Stores each had separate sales tax identification numbers and each filed separate sales tax returns. The Watkins Glen store filed under identification number 07-3281539S1 and the Odessa store filed under 07-3281539S2.<sup>2</sup>

For each of the stores, the sales tax returns for the five sales tax periods comprising the period at issue were entered into the record. The signature of David Abrams appeared on each store's returns for three of the periods. The returns were unsigned for two of the periods. David Abrams signed as general manager for one of the periods and as president for two of the periods.

#### CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under

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<sup>2</sup>These identification numbers are also set forth on the notices of determination herein (see Finding of Fact "1").

Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect tax is defined as:

"any officer, director, or employee of a corporation...who as such officer, director or employee is under a duty to act for such corporation...in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

B. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564). The holding of corporate office does not, per se, impose tax liability upon an officeholder (Matter of Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430).

C. "The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of [the Tax Appeals] Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interests in the corporation (citations omitted)." (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990.)

D. Resolution of the instant matter clearly turns upon an evaluation of the evidence in light of petitioner's burden of proof (see, 20 NYCRR 3000.10[d][4]). The Division presented documentation which revealed petitioner's signature as president of Finger Lakes Farm Stores, Inc. on numerous documents filed with the State Liquor Authority before, during and after the period at issue. The record herein also shows that petitioner was one of two directors and shareholders of the corporation during the period at issue.

To refute the Division's evidence, petitioner sought to prove that he resigned as president prior to the audit period; that he held no corporate status or position during the audit period; that he had no day-to-day involvement with the corporation; and that certain of the signatures on the various State Liquor Authority documents were not his.

To establish his contentions, petitioner presented the letter of resignation and corporate

minutes to prove he resigned his office prior to the audit period. Considering the self-serving nature of this unsworn documentation and the fact that petitioner's signature, as president, appears on documents dated within the period at issue, the letter of resignation and the corporate minutes fail to prove petitioner's resignation as president. Furthermore, even if petitioner had so resigned, there is no evidence that he ever relinquished his status as a director of the corporation.<sup>3</sup> Status as a director is sufficient to expose petitioner to liability under Tax Law § 1131(1). Also, the fact that the corporate minutes state that Kenneth Miner, an individual described in the record as the corporation's bookkeeper, was elected president indicates that, even if petitioner resigned, he likely gave up little, if any, authority.

Additionally, as the Division notes in its brief, it appears that neither petitioner nor the corporation ever notified the State Liquor Authority of petitioner's purported resignation as required pursuant to Alcoholic Beverage Control Law § 99-d.2. This also weighs against the legitimacy of petitioner's claim of resignation.

Petitioner's contention that he had no day-to-day management responsibilities in the corporation is also rejected as unsubstantiated. Yet, even if proven, the lack of such day-to-day involvement does not

necessarily preclude a finding of liability under Tax Law § 1133(a) (see, Matter of Cohen v. State Tax Commn., supra).

Finally, petitioner's contention questioning the authenticity of signatures on various documents is rejected. The evidence presented to establish this contention was the testimony of the corporation's attorney who is not a handwriting expert. Notably lacking was the testimony of such an expert and of petitioner himself.

E. The petition of Robert S. Abrams, officer of Finger Lakes Farm Stores, Inc., is denied

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<sup>3</sup>On this point it is noted that the testimony of petitioner's witness to the effect that petitioner held no corporate status or position with the corporation during the relevant period is rejected inasmuch as there is no evidence in the record which clearly indicates that petitioner resigned as a director.

and the notices of determination, dated April 12, 1988, as adjusted by the Conciliation Order dated December 22, 1989, are sustained.

DATED: Troy, New York  
August 13, 1992

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE